(3)

No. 07-515

In the Supreme Court of the United States

DANIEL E. CARPENTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
DAVID E. HOLLAR
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the denial of a criminal defendant's motion for acquittal is subject to immediate interlocutory appeal under the collateral order doctrine when the district court has granted the defendant's alternative motion for a new trial.

2. Whether the government's interlocutory appeal of a district court order granting a new trial entitles a defendant to cross-appeal the denial of his motion for acquittal.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 8
Conclusion 21

TABLE OF AUTHORITIES

Cases:

Abney v. *United States*, 431 U.S. 651 (1977) 10, 11, 18
Boyle v. *Brown*, 404 F.3d 1159 (9th Cir. 2005) 15
Burks v. *United States*, 437 U.S. 1 (1978) 11
Cohen v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) 9
Flanagan v. *United States*, 465 U.S. 259 (1984) 9
Justices of Boston Mun. Ct. v. *Lydon*, 466 U.S. 294 (1984) 12, 13
Midland Asphalt Co. v. *United States*, 489 U.S. 794 (1989) 8
Patterson v. *Haskins*, 470 F.3d 645 (6th Cir. 2006), cert. denied, 128 S. Ct. 90 (2006) 13, 15
Price v. *Georgia*, 398 U.S. 323 (1970) 11, 13
Richardson v. *United States*, 468 U.S. 31 (1984) 7, 8, 11, 12, 18
Smalis v. *Pennsylvania*, 476 U.S. 140 (1986) 11
Swint v. *Chambers County Comm'n*, 514 U.S. 35 (1995) 18

Cases–Continued: Page

United States v. *Adkinson*, 135 F.3d 1363 (11th Cir. 1998) 15
United States v. *Ball*, 163 U.S. 662 (1896) 11
United States v. *Becker*, 929 F.2d 442 (9th Cir.), cert. denied, 502 U.S. 862 (1991) 16
United States v. *Bishop*, 959 F.2d 820 (9th Cir. 2005) ... 15
United States v. *Bundy*, 392 F.3d 641 (4th Cir. 2004) ... 18
United States v. *Cahalane*, 560 F.2d 601 (3d Cir. 1977), cert. denied, 434 U.S. 1045 (1978) 17
United States v. *Douglas*, 874 F.2d 1145 (7th Cir.), cert. denied, 493 U.S. 841 (1989) 15
United States v. *Eberhart*, 388 F.3d 1043 (7th Cir. 2004), rev'd on other grounds, 546 U.S. 12 (2005) 10, 17
United States v. *Ferguson*, 246 F.3d 129 (2d Cir. 2001) 10, 17
United States v. *Ganos*, 961 F.2d 1284 (7th Cir. 1992) 14
United States v. *Greene*, 834 F.2d 86 (4th Cir. 1987) 17, 18
United States v. *Gutierrez-Zamarana*, 23 F.3d 235 (9th Cir. 1994) 13
United States v. *Hamilton*, 46 F.3d 271 (3d Cir. 1995) .. 16
United States v. *Hsia*, 176 F.3d 517 (D.C. Cir. 1999), cert. denied, 528 U.S. 1136 (2000) 16
United States v. *Kouri-Perez*, 187 F.3d 1 (1st Cir. 1999) 7
United States v. *Marasco*, 487 F.3d 543 (8th Cir. 2007) 16

Cases–Continued: Page

United States v. *Margiotta*, 646 F.2d 729 (2d Cir. 1981), cert. denied, 461 U.S. 913 (1983) 16
United States v. *Martin Linen Supply Co.*, 430 U.S. 564 (1972) 11
United States v. *McAleer*, 138 F.3d 852 (10th Cir.), cert. denied, 525 U.S. 854 (1998) 13, 14, 15
United States v. *Miller*, 952 F.2d 866 (5th Cir.), cert. denied, 505 U.S. 1220 (1992) 14, 15
United States v. *Sanges*, 144 U.S. 310 (1892) 16
United States v. *Scott*, 437 U.S. 82 (1978) 16
United States v. *Tateo*, 377 U.S. 463 (1964) 11
United States v. *Wiles*, 106 F.3d 1516 (10th Cir.), cert. denied, 522 U.S. 947 (1997) 15
United States v. *Wood*, 958 F.2d 963 (10th Cir. 1992) 10, 17
Will v. *Hallock*, 546 U.S. 345 (2006) 9, 20

Constitution, statutes and rules:

U.S. Const.:
Amend. V 10
Double Jeopardy Clause 11, 11, 13
Judiciary Act of 1789, ch. 20, 1 Stat. 84 8
Internal Revenue Code (26 U.S.C.):
§ 1031 2
§ 1031(a)(3) 2
18 U.S.C. 1341 1
18 U.S.C. 1343 2

Statutes and rule—Continued: Page

18 U.S.C. 3731 ..... 16, 18
18 U.S.C. 3731 (Supp. IV 2004) 16
28 U.S.C. 1291 8
Fed. R. Crim. P.:
Rule 29 ..... 5, 14, 19
Rule 29(c) 17
Rule 33 5

In the Supreme Court of the United States

No. 07-515

DANIEL E. CARPENTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 494 F.3d 13. The opinion of the district court (Pet. App. 47a-88a) is reported at 405 F. Supp. 2d 85.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 2007. The petition for a writ of certiorari was filed on October 16, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a trial in the United States District Court for the District of Massachusetts, a jury found petitioner guilty of fourteen counts of mail fraud, in violation of 18 U.S.C. 1341, and five counts of wire fraud, in violation of

18 U.S.C. 1343. Post-trial, the district court denied petitioner's motion for acquittal but granted his motion for a new trial. Pet. App. 47a-88a. The government appealed the new trial order, and petitioner cross-appealed the denial of his acquittal motion. The court of appeals affirmed the district court's grant of a new trial and dismissed the cross-appeal for lack of jurisdiction. Pet. App. 1a-46a.

1. Section 1031 of the Internal Revenue Code, Title 26 U.S.C., allows a person to sell commercial property but defer the capital gains tax if he uses the proceeds to purchase replacement property within 180 days. I.R.C. 1031(a)(3). To be eligible for this tax deferral, the seller cannot take possession of the proceeds during the 180-day window. Accordingly, so-called Section 1031 intermediaries offer their services to hold the proceeds in escrow until the seller is ready to purchase replacement property. Pet. App. 2a.

Petitioner served as chairman of Benistar Property Exchange Trust Company (BPE), one such Section 1031 intermediary. BPE's written agreements with its clients provided that the proceeds from their initial property sales would go directly to BPE. BPE was to hold those funds in a Merrill Lynch Ready Asset Money Market Account paying 3% interest (if the client wanted access to the funds on 48 hours' notice) or a Merrill Lynch Investment Account paying 6% interest (if the client was willing to wait 30 days for the funds). Pet. App. 2a-3a. BPE was to release the funds—either to the client or to the seller of replacement property—only on the client's written direction. C.A. App. 241, 254.

The trial evidence showed that petitioner had little direct contact with clients but approved almost all written materials that clients received from BPE. Pet. App.

3a; Gov't C.A. Br. 4-7. Petitioner was primarily responsible for receiving, holding, and disbursing clients' funds. In this capacity, he began to use those funds (without the clients' knowledge) for high-risk, speculative trading in stock options. Apparently, his intent was to return the clients' funds and specified interest to them, while keeping for himself the trading profits, which he hoped would exceed $1 million. Pet. App. 3a-4a; C.A. App. 391.

Petitioner first opened accounts at Merrill Lynch, which warned him orally and in writing that his stock option trading was extremely risky. The Merrill Lynch brokers counseled petitioner further on the dangers of his investment strategy when, in 2000, the stock market began a downturn. Petitioner continued the same high-risk trading activity and, after he had lost $4 million, Merrill Lynch terminated his trading privileges. Pet. App. 3a.

Petitioner then opened an account with Paine Webber with a similar plan and similar results. Petitioner engaged in high-risk options trading, despite warnings from Paine Webber, and his trading privileges were terminated after he sustained heavy losses. Although petitioner initially repaid outgoing clients with incoming client funds, the trading losses became so great that BPE was forced to close. BPE's clients lost approximately $9 million of the funds BPE held for them. Pet. App. 4a.

2. The government's theory at trial was that petitioner knew that promotional materials for BPE that he had seen and approved represented to investors—or misled them into believing—that their funds would be held safely in escrow accounts. More specifically, evidence presented at trial showed that petitioner knew

that none of the documentation BPE provided clients disclosed that their funds would be invested in high risk options trading. In other words, petitioner schemed to obtain money to pursue his risky financial ventures by falsely concealing that material fact from clients who thought their money instead "would be held safely in escrow accounts." Pet. App. 60a. To support its theory, the government introduced evidence at trial of petitioner's high-risk trading activity to demonstrate the falsity of many of the representations in BPE's literature that investor funds would be "kept safe." *Id.* at 6a.

Petitioner contended, among other things, that because the written agreements referred to the client money in either the 3% or 6% escrow accounts as "invested" he had "total [] unfettered discretion" to "invest" those funds in options if he so desired. At a minimum, he alleged, he believed in good faith that he had the right to make risky investments, and thus lacked the intent to defraud. Pet. App. 5a; C.A. App. 91, 99, 101, 152, 154-156.

In its closing argument, the government focused on petitioner's options trading activity after he had received warnings from brokers and contrasted this with petitioner's knowledge of the purpose of a Section 1031 intermediary to safely and securely hold funds in escrow. In this context, the government, without objection, referred to petitioner as having "gambled" with the funds on multiple occasions. Pet. App. 7a; C.A. App. 122-150. The defense responded to this argument in its own closing, arguing that investing in options is not gambling. C.A. App. 151-191.

3. At the end of the 13-day trial, the jury found petitioner guilty on all counts. The next week, petitioner filed two separate motions, one for a judgment of acquit-

tal under Fed. R. Crim. P. 29, and a separate motion for a new trial under Fed. R. Crim. P. 33. Crim. No. 04-10029, Docket Entry Nos. 158, 160. The motion for acquittal argued that the government had introduced insufficient evidence (1) that petitioner had not acted in good faith, (2) that petitioner caused the specific mailings and wires alleged in the indictment, and (3) that venue was proper in the District of Massachusetts. Petitioner also alleged a fatal variance from or constructive amendment of the indictment. Pet. App. 48a. The Rule 33 motion contended that a new trial was warranted because the government failed to disclose exculpatory evidence and made improper closing arguments. *Id.* at 66a.

4. The district court denied petitioner's motion for acquittal. Pet. App. 48a-66a. The court first concluded that venue was proper. *Id.* at 48a-57a. Next, the court found no constructive amendment or variance because the government's trial theory was "well within the scope of the indictment." *Id.* at 58a. The district court rejected petitioner's good faith argument because petitioner's purported good faith belief "that he was free, under the terms of the transactions with the exchangors, to invest their funds as he saw fit * * * is not the point." *Id.* at 60a. The fraud, the court explained, stemmed not from what petitioner did with the money but from the fact that he "obtain[ed] the exchangors' money on the basis of assurances known by [petitioner] to be fraudulent." *Ibid.* The district court found sufficient evidence in the record for the jury to conclude that petitioner "knew that the material information that their funds would be used in options trading was withheld from the exchangors" and to "find beyond a reasonable doubt that [petitioner] had a specific intent to defraud." *Ibid.* Finally, the court concluded in light of petitioner's review

and approval of the materially misleading promotional materials and transaction documents, as well as his role heading the company, that sufficient evidence supported the jury's conclusion that petitioner "reasonably foresaw that the mails or interstate wire communication facilities would be used in the consummation of the transactions." *Id.* at 63a.

Turning to the new trial motion, the district court rejected petitioner's claim that the government had committed any ethical breach in its disclosure of potentially exculpatory material. Pet. App. 66a-78a. The court, however, did find that the government's repeated use of gambling references in closing argument "may have diverted the jury from its consideration of the crimes charged and may thus have induced a verdict based on the jury's disapproval of the 'gambling,' rather than because the jury was satisfied beyond a reasonable doubt that the elements of the offenses charged had been proven." *Id.* at 81a-82a. The court determined that "the jury would certainly have been warranted in concluding beyond a reasonable doubt that [petitioner] acted with intent to defraud, but a contrary conclusion also would have been rationally possible on the evidence." *Ibid.* Thus, the court could not say "with confidence that the government's improper closing arguments did not taint the verdict." *Ibid.* On that basis, the court set the conviction aside and granted petitioner's motion for a new trial. *Ibid.*

5. The government appealed the grant of the new trial, arguing that because petitioner had not objected to the closing argument, plain error provided the appropriate standard. A divided court of appeals affirmed. Declining to apply the plain-error standard and considering the "substantial deference" afforded the trial court in

granting a new trial, the majority found no abuse in the decision. Pet. App. 8a-23a.[1] Judge Campbell dissented from that determination. He would have remanded the case for further findings under a plain error standard. *Id.* at 36a-46a.

Petitioner attempted to cross-appeal the denial of his motion for acquittal, but the court of appeals dismissed for lack of jurisdiction. Pet. App. 23a-33a. The court rejected petitioner's claim that he could appeal under the collateral order doctrine because that doctrine applies only when a failure to permit immediate appeal will "infringe rights which appellant could not effectively vindicate in an appeal after final judgment in the case." *Id.* at 26a (quoting *United States* v. *Kouri-Perez*, 187 F.3d 1, 5 (1st Cir. 1999)). Applying this Court's decision in *Richardson* v. *United States*, 468 U.S. 317 (1984), the court of appeals concluded that petitioner had no right not to be retried for his offense, so there was no right for him to vindicate on appeal. Pet. App. 26a-28a.[2] The court also noted that petitioner's "sufficiency arguments are deeply entwined with the merits of the mail and wire fraud charges that constitute the underlying action" and

---

[1] Judge Lynch filed a concurring opinion, emphasizing that she did not find that the government had argued "improperly," but only that the district court could determine in the interest of justice that the closing might have accidentally distracted the jury from considering the charges. Pet. App. 34a-35a.

[2] The court of appeals noted that petitioner had not moved the trial court to dismiss the indictment on double jeopardy grounds and that the court of appeals was therefore "not reviewing a double jeopardy ruling by the trial court, or a claim that such a double jeopardy ruling itself falls within the collateral order doctrine." Pet. App. 27a-28a n.9. Rather, the court explained, petitioner had urged double jeopardy considerations in support of his argument that the district court's denial of the motion to acquit was itself subject to immediate appeal. *Ibid.*

there was "little comparability between the review" of the new trial grant and the review that would be necessary to resolve petitioner's sufficiency claims. *Id.* at 32a.

ARGUMENT

Petitioner contends (Pet. 15-23) that he is entitled to interlocutory review of his claim that the evidence at his first trial was insufficient, even though the district court granted him a new trial and the court of appeals affirmed that decision. That contention is foreclosed by the reasoning of *Richardson* v. *United States*, 468 U.S. 317 (1984). The court of appeals' application of *Richardson* is correct and does not conflict with the decision of any other appellate court. Review of that question by this Court is therefore unwarranted. Nor is there any need for the Court to review the second issue presented in the petition, whether the court of appeals had pendent jurisdiction over the denial of petitioner's motion to acquit in light of the government's interlocutory appeal of the district court's grant of a new trial. The court of appeals' decision on that point does not conflict with any decision of this Court or any other court of appeals, and the fact-bound determination that the two appeals were not sufficiently entwined with one another was correct and does not, in any event, warrant this Court's review.

1. Congress has, from the outset, limited appellate courts to reviewing the "final judgments and decrees" of federal district courts, a rule presently embodied in 28 U.S.C. 1291. See *Midland Asphalt Co.* v. *United States*, 489 U.S. 794, 798 (1989) (citing Judiciary Act of 1789, 1 Stat. 73, 84). "In a criminal case the rule prohibits appellate review until conviction and imposition of sen-

tence." *Flanagan* v. *United States*, 465 U.S. 259, 263 (1984).

In *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), the Court has construed the final judgment rule to permit review of certain interlocutory decisions that implicate "rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated," *id.* at 546. To qualify for immediate appeal, under *Cohen*'s collateral order doctrine, an order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will* v. *Hallock*, 546 U.S. 345, 350 (2006) (quotation marks omitted). In recent cases, the Court has stressed the doctrine's "modest scope." *Ibid.*

a. Appeal from the denial of a motion to acquit, when the district court has ordered a new trial, fails the collateral order doctrine's second requirement. Rather than being "completely separate from the merits of the action," review of a motion to acquit is exclusively about the merits of the action—the sufficiency of the government's evidence to prove the elements of the crime. See Pet. App. 32a (petitioner's "sufficiency arguments are deeply entwined with the merits of the mail and wire fraud charges that constitute the underlying action").

Petitioner does not cite any decision by any court of appeals that holds that the denial of a motion to dismiss on sufficiency of the evidence grounds is subject to immediate appellate review under the collateral order doctrine. To the contrary, several courts of appeals have, like the court below, specifically held that defendants are *not* entitled to review of the sufficiency of the govern-

ment's evidence under the collateral order doctrine. See Pet. App. 27a; *United States* v. *Eberhart*, 388 F.3d 1043, 1051-1052 (7th Cir. 2004), rev'd on other grounds, 546 U.S. 12 (2005); *United States* v. *Ferguson*, 246 F.3d 129, 137-138 (2d Cir. 2001); *United States* v. *Wood*, 958 F.2d 963, 970 (10th Cir. 1992). Therefore, that issue does not warrant further review by this Court.

b. In the absence of support for a collateral order appeal of sufficiency claims, petitioner attempts to analogize the denial of a motion to acquit to the denial of a non-frivolous motion to dismiss proceedings based on the Double Jeopardy Clause, which is immediately appealable, see *Abney* v. *United States*, 431 U.S. 651 (1977), but that analogy is mistaken.[3] As the Court explained in *Abney*, "[t]he elements of [a double jeopardy] claim are completely independent of [the defendant's] guilt or innocence." *Id.* at 660. The defendant "makes no challenge whatsoever to the merits of the charge against him" in raising a double jeopardy claim, only that he has already been subjected to jeopardy for the same offense. *Id.* at 659. Here, in contrast, the issue presented by petitioner on appeal went directly to the merits—that "the government failed to present sufficient evidence * * * to permit a reasonable jury to convict him." Pet. App. 23a. Thus, petitioner's analogy to double jeopardy fails.

Petitioner's analogy to double jeopardy is further flawed because, where, as here, a defendant has been found guilty and then granted a new trial, there has been no termination of the initial jeopardy. Under the Double Jeopardy Clause, acquittal of a substantive criminal charge bars retrial because it finally disposes of the

[3] The Double Jeopardy Clause of the Fifth Amendment provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. Amend. V.

case and terminates the defendant's jeopardy. See, *e.g.*, *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1972). This is so whether it is the jury, *United States* v. *Ball*, 163 U.S. 662, 671 (1896), the trial judge at a bench trial, *Smalis* v. *Pennsylvania*, 476 U.S. 140, 144 (1986), the trial judge on motion for acquittal, *Burks* v. *United States*, 437 U.S. 1, 10-11 (1978), or a reviewing court, *id.* at 18, that finds the evidence to be insufficient to sustain a conviction. By contrast, when a defendant's conviction is set aside based on "an error in the proceedings leading to conviction," *United States* v. *Tateo*, 377 U.S. 463, 465 (1964), the defendant remains in "continuing jeopardy" because the "criminal proceedings against an accused have not run their full course," *Price* v. *Georgia*, 398 U.S. 323, 326 (1970). In such circumstances, the Double Jeopardy Clause does not preclude retrial. *Ibid.*

In *Richardson* v. *United States*, *supra*, the Court held that the Double Jeopardy Clause does not bar retrial after a mistrial, despite a defendant's request for a judgment of acquittal. In that case, after the district court declared a mistrial based on jury deadlock, the defendant moved to dismiss the charges on double jeopardy grounds, arguing that the evidence presented at his trial had been insufficient as a matter of law. 468 U.S. at 318-319. The district court denied the motion, and the defendant appealed. *Id.* at 319. The court of appeals dismissed the appeal for lack of jurisdiction, and this Court issued a writ of certiorari. *Id.* at 319-320.

After finding the defendant's double jeopardy claim sufficiently colorable to support appeal under *Abney*, see *Richardson*, 468 U.S. at 322, the Court rejected it on the merits. The Court found that only an "event, such as an acquittal, which terminates the original jeopardy" implicates the Double Jeopardy Clause. *Id.* at 325 (cit-

ing *Justices of Boston Mun. Court* v. *Lydon*, 466 U.S. 294 (1984)). While an "appellate court's finding of insufficient evidence" constituted such an event, a trial court's declaration of a mistrial did not. *Id.* at 325-326. Consequently, "[r]*egardless of the sufficiency of the evidence at petitioner's first trial*, he has no valid double jeopardy claim to prevent his retrial." *Id.* at 326 (emphasis added). The Court also concluded that future double jeopardy claims based on similar facts were no longer "colorable" and thus would not be appealable before final judgment. *Id.* at 326 n.6.[4]

The decision of the court below correctly applies the holding and analysis in *Richardson*. While the defendant in *Richardson* sought sufficiency review after the court declared a mistrial based on a hung jury and petitioner here pursues review after the grant of a motion for new trial, that distinction does not warrant a different result. Petitioner's contention that the jury's *finding of guilt*, which has been vacated by a district court order granting a new trial, constitutes a "greater state of finality" than a mistrial based on a hung jury, Pet. 14, and that the former "terminates the original jeopardy," Pet. 18 (quoting *Richardson*, 468 U.S. at 325), is untenable. The only difference between *Richardson* and this case is that here twelve jurors found the government's

[4] As noted above, see *supra* note 2, petitioner did not move the district court to preclude a retrial on double jeopardy grounds, nor did he raise an independent double jeopardy claim in the court of appeals. See Pet. App. 27a-28a n.9. Petitioner instead raised double jeopardy concerns only to support his argument that the denial of a motion to acquit should be treated as a collateral order subject to immediate appeal. Thus, *Richardson*'s holding that the district court's denial of the defendant's double jeopardy motion in that case was sufficiently colorable to support appellate jurisdiction (before the issue was resolved by this Court) has no application to this case.

evidence sufficient to prove petitioner's guilt beyond a reasonable doubt. While jeopardy can terminate without an express acquittal, such as when a guilty verdict is returned only on a lesser charge, thereby implicitly acquitting the defendant on the greater charge, see *Price*, 398 U.S. at 329, a finding of guilt that is then vacated does not constitute termination of jeopardy as to the count on which the guilty verdict was rendered, *ibid.* As in *Richardson*, there has been no termination of jeopardy in petitioner's case because there has been no acquittal at any stage of the proceedings. Cf. *Lydon*, 466 U.S. at 309 (noting that a "claim of evidentiary failure" does not terminate jeopardy, while a "legal judgment to that effect" does).

Although petitioner did not raise a double jeopardy claim per se, see note 4, *supra*, it is notable that the courts of appeals have, following *Richardson*, uniformly concluded that the Double Jeopardy Clause does not preclude a retrial following the grant of a new trial, regardless of the sufficiency of the government's evidence at the first trial. See, *e.g.*, Pet. App. 27a; *Patterson* v. *Haskins*, 470 F.3d 645, 660 (6th Cir. 2006) (retrial after court of appeals' failure to consider sufficiency of the evidence claim did not constitute double jeopardy, "even assuming that we would have determined that the evidence was indeed insufficient"); *United States* v. *McAleer*, 138 F.3d 852, 857 (10th Cir.) ("when a guilty verdict is set aside on the defendant's motion, original jeopardy has not been terminated and retrial does not violate the Double Jeopardy Clause 'regardless of the sufficiency of the evidence at the first trial'"), cert. denied, 525 U.S. 854 (1998); *United States* v. *Gutierrez-Zamarano*, 23 F.3d 235, 238 (9th Cir. 1994) ("Appellant's retrial will not violate the Double Jeopardy Clause regard-

less of the sufficiency of the evidence at the first trial."); *United States* v. *Ganos*, 961 F.2d 1284, 1285 (7th Cir. 1992) ("the double jeopardy clause does not prevent the holding of a second trial when no court has determined that the evidence at the first trial was insufficient"); *United States* v. *Miller*, 952 F.2d 866, 874 (5th Cir.) (rejecting claim that double jeopardy bars retrial if evidence at initial trial was insufficient), cert. denied, 505 U.S. 1220 (1992).

Indeed, at least three courts of appeals have held that double jeopardy claims on grounds similar to those that petitioner advanced under Rule 29 were not sufficiently colorable to sustain collateral order review under *Abney*. See *McAleer*, 138 F.3d at 857 (construing appeal of denial of Rule 29 motion as claim of double jeopardy, but finding that defendant had "not raised a colorable claim"); *Ganos*, 961 F.2d at 1285 (double jeopardy claim based on facts such as petitioner's was "frivolous"); *Miller*, 952 F.2d at 872 n.5 (claim colorable in light of circuit precedent predating *Richardson*, but no longer colorable in light of holding in *Miller*).

Thus, even if petitioner's analogy of his Rule 29 appeal to double jeopardy claims were otherwise apposite, there would still be no reason for this Court to review the court of appeals' decision.

c. Petitioner appears to contend (Pet. 20-23) that the court of appeal's decision is somehow in tension with the practice adopted by many courts of appeals that, when the court orders a new trial on appeal from a final judgment, it should or must also review a challenge to the sufficiency of the evidence at the first trial. Any such practice, however, has no relevance to the jurisdictional question presented here: whether the denial of the mo-

tion for acquittal is a collateral order subject to immediate appeal.

Significantly, petitioner concedes that the "rough consensus" of the courts that have adopted such a practice recognize that "review of sufficiency arguments after conviction and prior to retrial *is not technically compelled by the Double Jeopardy Clause*." Pet. 21 (emphasis added). See, *e.g.*, *Patterson*, 470 F.3d at 657 (6th Cir); *United States* v. *Adkinson*, 135 F.3d 1363, 1379 n.48 (11th Cir. 1998); *United States* v. *Bishop*, 959 F.2d 820, 829 n.11 (9th Cir. 1992), overruled in part on other grounds as stated in *Boyle* v. *Brown*, 404 F.3d 1159, 1171 n.1 (9th Cir. 2005); *Miller*, 952 F.2d at 874 (5th Cir.); *United States* v. *Douglas*, 874 F.2d 1145, 1150 (7th Cir.), cert. denied, 493 U.S. 841 (1989). While petitioner cites the Tenth Circuit as having held that "the prohibition against double jeopardy requires" the practice, see Pet. 21 (quoting *United States* v. *Wiles*, 106 F.3d 1516, 1518 (1997)), petitioner does not contend that his interlocutory appeal would have been heard in that circuit. To the contrary, the Tenth Circuit has expressly held, in a case subsequent to *Wiles*, that the denial of a Rule 29 motion is not subject to interlocutory appeal when the district court grants a retrial, even when the appeal is construed as advancing a double jeopardy claim. See *McAleer*, 138 F.3d at 857.

Thus, the practice reflected in the cases petitioner cites provides no grounds for the Court to review his contention that the collateral order doctrine justifies the review of the denial of a motion for acquittal when the district court has granted the defendant's motion for a new trial.

2. Petitioner additionally argues (Pet. 23-33) that the court of appeals erred in rejecting his claim that

defendants have a right "as a matter of fairness and prudence" to cross-appeal whenever the government files an interlocutory appeal under 18 U.S.C. 3731 (Supp. IV 2004). That argument also lacks merit and does not warrant this Court's review.

Explicit statutory authorization is required for the government to appeal in a criminal case. See *United States* v. *Scott*, 437 U.S. 82, 84-85 (1978); *United States* v. *Sanges*, 144 U.S. 310 (1892). Section 3731 provides a limited set of circumstances in which the government may appeal, including when the district court "grant[s] a new trial after verdict or judgment." The statute authorizes only appeals "by the United States." 18 U.S.C. 3731 (Supp. IV 2004). As numerous courts of appeals have recognized, the statutory text implies no intent to permit a defense appeal or cross-appeal. See, *e.g.*, *United States* v. *Marasco*, 487 F.3d 543, 546 (8th Cir. 2007) ("the statute does not provide for a cross-appeal by a defendant"); *United States* v. *Hsia*, 176 F.3d 517, 526-527 (D.C. Cir. 1999), cert. denied, 528 U.S. 1136 (2000) (refusing to grant defendants "a windfall opportunity to delay proceedings via cross-appeal"), cert. denied, 528 U.S. 1136 (2000); *United States* v. *Hamilton*, 46 F.3d 271, 279 n.8 (3d Cir. 1995) (Section 3731 "preclud[es] a defendant from filing a cross-appeal") *United States* v. *Becker*, 929 F.2d 442, 447 (9th Cir.) ("A defendant may not file a cross appeal to a section 3731 interlocutory appeal."), cert. denied, 502 U.S. 862 (1991); *United States* v. *Margiotta*, 646 F.2d 729, 734 (2d Cir. 1981), cert. denied, 461 U.S. 913 (1983) (cross-appeal "unavailable with interlocutory appeals pursuant to §3731").

In particular, the Second, Third, Seventh, and Tenth Circuits have each held, as did the court below, that a government appeal of an order granting a new trial does

not entitle a defendant to cross-appeal the denial of his motion for acquittal. See *Eberhart*, 388 F.3d at 1051-1052 (7th Cir.); *Ferguson*, 246 F.3d at 137-138 (2d Cir.); *Wood*, 958 F.2d at 967-971 (10th Cir.); *United States* v. *Cahalane*, 560 F.2d 601, 608 (3d Cir. 1977), cert. denied, 434 U.S. 1045 (1978).

Petitioner urges the Court to grant the petition for a writ of certiorari in order to resolve a conflict between those courts and a decision of the Fourth Circuit in *United States* v. *Greene*, 834 F.2d 86 (1987), in which the court did review a defendant's sufficiency claim after affirming a government appeal from the grant of a new trial. The decision below does not squarely conflict with *Greene*, however, and, to the extent there might arguably be a conflict, there are good reasons to believe the Fourth Circuit would revisit the holding in *Greene* if presented with the opportunity.

First, it appears that in *Greene* the "question as to the appealability of the denial of the Rule 29(c) motion, * * * was abandoned" by the government, 834 F.2d at 87, after "the district court certified that in view of the government's appeal, there was no just reason for delay in determining the issue raised by the defendant in his Rule 29(c) motion as to the sufficiency of the evidence to convict him," *id.* at 89. Because the court of appeals appears to have viewed the district court's certification and government's waiver of its challenge to the appeal as significant, there is no clear conflict between that decision and the judgment below, where neither of those factors existed.

Second, in *Greene*, the defendant had moved the district court for acquittal because "to require another trial would violate his right not to be placed in jeopardy twice for the same offense." 834 F.2d at 87. The Fourth Cir-

cuit upheld its jurisdiction under the collateral order doctrine of "the district judge's denial of [Greene's] motion to dismiss the indictment on double jeopardy grounds." *Id.* at 89. To the extent that the court of appeals believed Greene's double jeopardy motion to be non-frivolous, immediate appeal would have been consistent with *Richardson*, 468 U.S. at 322, and *Abney*, 431 U.S. at 662. Here, by contrast, the court of appeals emphasized that petitioner had *not* moved the district court for relief on double jeopardy grounds, and, thus, there was no double jeopardy claim directly before it. Pet. App. 27a-28a n.9.

Third, while the Fourth Circuit has not had the need, or even the opportunity, to revisit *Greene* in the 20 years since that opinion issued, there are good reasons to believe that, to the extent the decision stands for the rule advocated by petitioner, the Fourth Circuit would reconsider the decision should the occasion arise. *Greene* did not even cite *Richardson* and its brief analysis combined reliance on the government's appeal with reliance on *Cohen*'s collateral order doctrine. Since *Greene*, at least seven courts of appeals have held that a cross-appeal from a Section 3731 appeal is not permitted, four in the explicit context of sufficiency of the evidence review. This Court too has reiterated the narrowness of pendent appellate review, restricting review of non-appealable orders to those "inextricably intertwined" with appealable ones or when review of the non-appealable order is "necessary to ensure meaningful review." *Swint* v. *Chambers County Comm'n*, 514 U.S. 35, 49-51 (1995). The Fourth Circuit has construed *Swint* to prohibit appellate review of non-appealable orders even when both the government and criminal defendant request such review as part of a conditional plea agreement, see *Uni-*

ted States v. *Bundy*, 392 F.3d 641, 649 (2004), thus casting significant doubt on the continuing vitality of *Greene*, to the extent that it ever stood for a general rule that the court of appeals could exercise pendent appellate jurisdiction over the denial of Rule 29 orders.

Petitioner contends (Pet. 26-28) that pendent appellate jurisdiction exists in this case under *Swint* because his motion for acquittal is "inextricably intertwined" with the review of his motion for new trial. The court of appeals correctly rejected that argument. The court correctly noted that to review petitioner's claims it would have to evaluate such issues as "causation, intent, constructive amendment of the indictment, reliance upon a theory of liability based on omission, good faith as an absolute defense, and venue." Pet. App. 32a. Not one of those issues was reviewed in the court's determination that the district court had not abused its discretion in concluding that the government's closing argument might have inadvertently caused the jury to convict based on its disapproval of petitioner's recklessly cavalier investment strategy rather than based on the evidence that petitioner acted with a specific intent to defraud. Even if there were some debate on the question, the court of appeals' finding that the two motions were not inextricably intertwined is a factual one that does not warrant this Court's review.

Finally, petitioner also raises various policy concerns that he contends justify interlocutory review of his sufficiency claim to serve "fairness and prudence." Pet. 24, 28-33. Principally, he contends that there are no "efficiency" gains from declining to review his motion for acquittal at this time. But this Court has made clear that such generalized arguments do not suffice to support collateral order review. It is only "avoidance of a

trial that would imperil a substantial public interest, that counts when asking whether an order is 'effectively' unreviewable if review is to be left until later." *Will*, 546 U.S. at 353.

In any event, the claimed efficiency of pendent collateral review in this case is not borne out. The primary issue on appeal from the new trial motion was whether the district court should have applied a plain error standard in evaluating the motion. See Pet. App. 8a-18a.[5] Little space was devoted in the briefs on the government's appeal to the overall weight or strength of the evidence against petitioner. In its brief, the government spent 18 pages explaining that it made no improper arguments and arguing that the district court used the wrong standard, Gov't C.A. Br. 28-43, but only three pages analyzing the strength of the evidence. *Id.* at 43-46. Petitioner devoted just four pages of his 61-page response brief to the purported "weakness of the government's case." Appellee Br. 32-36. Petitioner filed a separate, 58-page brief to press his Rule 29 claims. Cross-Appellant Br. 1-58. The court of appeals' fact-bound conclusion that it was unnecessary and inefficient to resolve those issues was correct and does not warrant review.

---

[5] Indeed, that was the position adopted by the dissent. See Pet. App. 37a-44a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

DAVID E. HOLLAR
Attorney

JANUARY 2008